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EVERISE SPRINT (M) SDN BHD v. MINISTER OF FINANCE, MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
B ROHANA YUSUF JCA
[CIVIL APPEAL NO: B-01-435-12-2013]
31 MARCH 2015

C ***REVENUE LAW:*** *Sales tax – Remission of – Application for remission of import duties and taxes – Demand on appellant and another company for same short-paid taxes – Whether absurd and unjust to impose liability on two parties at the same time – Whether appellant was 'importer' – Whether decision of respondents tainted with illegality - Customs Act 1967, s. 14A – Sales Tax Act 1972, s. 33*

D ***STATUTORY INTERPRETATION:*** *Taxing statute – Strict construction – Demand on two parties for same short-paid taxes – Whether created ambiguity and serious doubt as to liability under law – Whether absurd and unjust to impose liability on both parties at the same time*

E The appellant, who was in the business of buying and selling used prime movers, bought 69 units of used prime movers. The appellant claimed that it had bought the used prime movers from Scania Malaysia Sdn Bhd ('Scania Malaysia') and the supplier or exporter was Scania (GB) Ltd United Kingdom ('Scania UK'). After clearance with customs, the invoices for the customs duties, sales tax as well as other charges were issued to the appellant
F by the forwarders and the appellant made the lump sum payment for the invoices. Upon payment of the duties, the customs released the prime movers. Subsequently, the State Director of Customs, Selangor ('the second respondent') conducted an audit on Scania Malaysia in respect of the importation of the said prime movers and it was discovered that the declared value and the assessed value were not based on the actual amount paid to the
G exporter and that there was a shortfall in the import duties and sales taxes paid to the customs. The second respondent therefore proceeded to recover the short-paid taxes from the appellant. The appellant denied its liability on the ground that the appellant was not the 'importer' of the prime movers and applied for remission of the duties and taxes from the Ministry of Finance
H ('the first respondent') under s. 14A of the Customs Act 1967 ('the Customs Act') and s. 33 of the Sales Tax Act 1972 ('Sales Tax Act'). The first respondent refused the request and consequently the appellant filed for a judicial review application. The application was, however, dismissed by the High Court and hence, this appeal. The appellant relied on the grounds, *inter*
I *alia* (i) that the second respondent had erred in finding that the appellant was an importer under s. 2 of the Customs Act; and (ii) that the first respondent, upon reliance on information provided by the second respondent, had failed to exercise his discretion to remit the duties and taxes within the phrase 'just

and equitable' as envisaged under s. 14A of the Customs Act and s. 33 of the Sales Tax Act. The appellant further contended that the purported e-mail correspondences between the appellant and Scania UK which the respondents had relied on *inter alia,* to infer that there was a direct dealing between the appellant and Scania UK, were in relation to used prime movers in Complete Knock Down ('CKD') and not the prime movers bought by the appellant which was imported in Complete Built-Up ('CBU').

Held (allowing appeal with costs)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) Taxing law must be clear and cannot operate in ambiguity. The second respondent had sought the short-paid taxes from two respective parties, *ie*, the appellant as well as Scania Malaysia. The demand on two persons for the same short-paid taxes had created ambiguity and serious doubt as to who should be the one liable under the law. The courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists. Hence, it would be absurd and unjust to impose liability on the appellant as well as Scania Malaysia at the same time. (paras 23, 24 & 25)

(2) The respondents ought to have given consideration to the relevant facts in arriving at the decision to demand the short-paid taxes from the appellant. In accepting the e-mail communication to support a finding that the appellant was an importer, the respondents failed to note and appreciate the contents of the e-mail communications related to CKD prime movers where the appellant was a commission agent which had no relevance to the importation of CBU prime movers herein. (para 26)

(3) The first respondent was empowered with the necessary discretion to be exercised upon objective appreciation of the evidence before him. However, a decision premised on wrong appreciation of facts and the failure to consider relevant facts must stand quashed. The first respondent had made it clear in his affidavit that he had considered all evidence brought before him and having considered them, he declined the application of the appellant. However, having found that the second respondent had failed to take into account some relevant facts and had taken into account some irrelevant facts, the decision of the respondent was one which was tainted with illegality. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, yang mengendalikan perniagaan membeli dan menjual penggerak utama, membeli 69 unit penggerak utama. Perayu menyatakan bahawa ia telah membeli penggerak utama terpakai daripada Scania Malaysia Sdn Bhd ('Scania Malaysia') dan pembekal dan pengeksport adalah Scania (GB) Ltd United Kingdom ('Scania UK'). Selepas mendapat kelulusan pihak kastam, invois-invois bagi duti kastam, cukai jualan dan bayaran-bayaran dikeluarkan kepada perayu oleh penghantar dan perayu membuat bayaran sekaligus untuk

A invois-invois tersebut. Selepas bayaran duti, kastam melepaskan penggerak-penggerak utama tersebut. Kemudian, Pengarah Kastam Negeri, Selangor ('responden kedua') menjalankan audit dan didapati bahawa nilai yang diisytiharkan dan nilai yang ditaksir bukan berasaskan jumlah sebenar yang dibayar kepada pengeksport dan bahawa terdapat kekurangan dalam duti B import dan cukai jualan yang dibayar kepada kastam. Responden kedua, oleh itu, meneruskan untuk mendapatkan semula cukai yang terkurang bayar daripada perayu. Perayu menafikan liabilitinya atas alasan bahawa perayu bukan 'pengimport' penggerak-penggerak utama tersebut dan memohon pelepasan duti dan cukai daripada Kementerian Kewangan ('responden C pertama') di bawah s. 14A Akta Kastam 1967 ('Akta Kastam') dan s. 33 Akta Cukai Jualan 1972 ('Akta Cukai Jualan'). Responden pertama menafikan permohonan tersebut dan oleh itu, perayu memfailkan permohonan semakan kehakiman. Permohonan tersebut, walau bagaimanapun, ditolak oleh Mahkamah Tinggi dan oleh itu, rayuan ini. Perayu bersandar kepada alasan-D alasan, antara lain (i) bahawa responden kedua terkhilaf dalam mendapati bahawa perayu adalah pengimport di bawah s. 2 Akta Kastam; dan (ii) bahawa responden pertama, bersandarkan kepada maklumat yang diberikan oleh responden kedua, telah gagal melaksanakan budi bicaranya untuk meremit duti dan cukai dalam frasa 'just and equitable' seperti yang dibayangkan di bawah s. 14A Akta Kastam dan s. 33 Akta Cukai Jualan. E Perayu selanjutnya menghujahkan bahawa surat menyurat melalui e-mel antara perayu dan Scania UK di mana responden-responden bersandar untuk membuat inferens bahawa terdapat urusan secara langsung antara perayu dan Scania UK, adalah berkaitan dengan penggerak utama yang terpakai dalam Complete Knock Down ('CKD') dan bukan penggerak utama yang dibeli F oleh perayu yang diimport dalam Complete Built-Up ('CBU').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang percukaian semestinya jelas dan tidak boleh beroperasi dalam kesamaran. Responden kedua telah meminta cukai terkurang G bayar daripada dua pihak, iaitu, perayu dan juga Scania Malaysia. Tuntutan daripada dua orang bagi cukai terkurang bayar yang sama membentuk kesamaran dan keraguan yang serius mengenai siapa yang wajar bertanggungan dari segi undang-undang. Mahkamah enggan menggunapakai pentafsiran statut percukaian yang akan mengenakan H liabiliti apabila wujud keraguan. Oleh itu, adalah mustahil dan tidak adil untuk mengenakan liabiliti ke atas perayu dan juga Scania Malaysia pada masa yang sama.

(2) Responden-responden sepatutnya mempertimbangkan fakta-fakta yang relevan sebelum mencapai keputusan untuk menuntut cukai terkurang I bayar daripada perayu. Dalam menerima komunikasi secara e-mel untuk menyokong dapatan bahawa perayu adalah pengimport, responden-responden gagal mengambil kira dan mempertimbangkan

bahawa kandungan komunikasi e-mel berkait dengan penggerak utama CKD di mana perayu adalah ejen komisyen yang tiada kaitan dengan pengimportan penggerak utama CKD di sini.

(3) Responden pertama diberi kuasa dengan budi bicara yang diperlukan untuk dilaksanakan atas pertimbangan objektif keterangan di hadapannya. Walau bagaimanapun, keputusan yang berdasarkan pertimbangan fakta yang salah dan kegagalan mengambil kira fakta-fakta relevan wajar dibatalkan. Responden pertama telah menjelaskan dalam afidavitnya bahawa dia telah mempertimbangkan kesemua keterangan di hadapannya dan selepas mempertimbangkannya, dia menolak permohonan perayu. Walau bagaimanapun, setelah mendapati bahawa responden kedua telah gagal mengambil kira beberapa fakta relevan dan telah mengambil kira beberapa fakta yang tidak relevan, keputusan oleh responden dicemari oleh kepenyalahan undang-undang.

Case(s) referred to:

Cape Brandy Syndicate v. Inland Revenue Commissioners 12 TC 358 ***(refd)***

Council of Civil Service Unions & Ors v. Minister of Civil Service [1984] 3 All ER 935 ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Mangin v. Inland Revenue Commissioner [1971] AC 739 PC ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetables Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***

Legislation referred to:

Customs Act 1967, ss. 2, 13(1), 14A

Sales Tax Act 1972, s. 33

For the appellant - JR Ravendran (Shanker Kaliyana Sundara with him); M/s JR Ravendren & Assocs

For the respondents - Natra Idris; SFC

[Editor's note: For the High Court judgment, please see Everise Sprint (M) Sdn Bhd v. Menteri Kewangan Malaysia & Anor [2014] 6 CLJ 519 (overruled).]

Reported by S Barathi

JUDGMENT

Rohana Yusuf JCA:

[1] This is an appeal against the decision of the High Court at Shah Alam, given on 29 November 2013, dismissing the appellant's judicial review application. In the judicial review application, the appellant had sought an

order of *certiorari* to quash the decision of the Minister of Finance (first respondent) dated 25 May 2012. The decision of the first respondent was a refusal of remission of import duties and sales taxes pursuant to s. 14A of the Customs Act 1967 and s. 33 of the Sales Tax Act 1972 respectively, applied for by the appellant.

[2] Having read the written submissions of parties and heard their oral submissions on 11 August 2014, we stood down the matter for our further deliberation. We indicated to the parties that we would deliver our decision on a date to be informed. This is our decision.

[3] The appellant was in the business of buying and selling used prime movers. In the months of March to June 2008, the appellant bought 69 units of used prime movers. The appellant claimed that it had bought the used prime movers from Scania Malaysia Sdn Bhd (Scania Malaysia) at a unit price of RM111,278.50 to RM119,874 depending on the model (pp. 238 to 241 appeal records). The supplier or exporter of the prime movers was Scania (GB) Ltd United Kingdom (Scania UK).

[4] The importation of the prime movers requires an approved permit ("AP") issued by the Ministry of International Trade and Industry. Declaration in the customs declaration form (borang K1) and payment of the customs duties as well as taxes must be made before the said prime movers could be released from customs' control.

[5] In the borang K1, the name of another company, Red Synergy Corporation Sdn Bhd (Red Synergy) was stipulated as the consignee/importer of the said prime movers. Red Synergy held the AP in respect of importing the prime movers. Two authorised agents nominated to handle the importation were lMF Supplies & Service Sdn Bhd and Yumaco Freight Sdn Bhd respectively ('the forwarders'). After clearance with the customs, the forwarders issued the invoices for the customs duties, sales taxes as well as other charges to the appellant. A lump sum payment for the invoice was made by the appellant as shown at pp. 352 and 432 of the appeal records.

[6] The customs officer in ascertaining the customs duties payable had based his assessment on "harga panduan taksiran". After payment of the duties by the forwarders, the customs released the prime movers. The customs officer had valued RM33,000 as customs duties per unit of prime movers in accordance with s. 13(1) of the Customs Act 1967.

[7] Subsequently, an audit was conducted by the second respondent on Scania Malaysia in respect of the importation of the said prime movers for the purposes of verifying the declared value by the importer and the assessed value by the customs officer.

[8] From the audit conducted, it was discovered that the declared value and the assessed value were not based on the actual amount paid to the exporter. There was therefore a shortfall in the import duties and sales taxes (short-paid taxes) paid to the customs.

[9] Treating the short-paid taxes as a debt due to them, the second respondent had proceeded to take steps to recover the same from the appellant instead of Scania Malaysia upon whom the audit was conducted. First, a notice of demand dated 25 March 2011 was issued to the appellant requesting payment of the short-paid taxes of 23 units of the prime movers. Another notice of demand dated 1 April 2011 was issued by the customs demanding payment of short-paid taxes for the remaining 45 units of prime movers. The total amount of short-paid taxes was RM782,087.19 and RM1,467,340.29 respectively. On 28 March 2012, the second respondent issued an amended notice of demand claiming the short-paid taxes. The appellant denied its liability on the ground that the appellant was not the "importer" of the prime movers.

[10] On 20 April 2012, the appellant applied to the first respondent for a remission of the duties and taxes under s. 14A of the Customs Act 1967 and s. 33 of the Sales Tax Act 1972, respectively. The first respondent, *vide* a letter dated 25 May 2012 had refused the appellant's request. Consequently, the appellant filed a judicial review application against that decision of the first respondent. The learned High Court Judge had dismissed the judicial review application, hence this appeal by the appellant.

[11] The memorandum of appeal contains four grounds of appeal. Essentially, the grounds raised may be broadly summed up into two main issues *viz*; that the second respondent had erred in finding that the appellant was an importer under s. 2 of the Customs Act and that the first respondent upon reliance on information provided by the second respondent had failed to exercise his discretion to remit the duties and taxes within the phrase "just and equitable" as envisaged under s. 14A of the Customs Act and s. 33 of the Sales Tax Act.

[12] First we noted that the word "importer" under s. 2 "includes and applies to any owner or other persons for the time being possessed of or beneficially interested in any goods at and from the time of importation thereof until such goods are duly removed from customs control". From this definition it becomes apparent that who is an "importer" would certainly be based not only on the facts of each particular case, but also upon whether the goods had been removed from customs' control. In arriving at his decision that the appellant was the importer of the prime movers, here we noted that the first respondent in fact had taken into account various relevant facts as laid out by the second respondent before him. It was also not disputed that the first respondent had relied on the facts and information given by the second respondent.

[13] In his judgment the learned High Court Judge had concluded that the first respondent had considered all evidence before him in the exercise of his discretion under s. 14A of the Customs Act and s. 33 of the Sales Tax Act and hence no judicial intervention should ensue.

[14] We took note that the first respondent in his affidavit (para. 11.3) had deposed that in issuing the notice of demand to the appellant, the second respondent had taken into account all the surrounding facts such as:

(i) Red Synergy's AP were used and declared in the borang K1 as consignee or importer but it was not the party which paid;

(ii) Red Synergy did not pay any customs duties or sales taxes on the prime movers;

(iii) invoices for service charges, customs duties and sales taxes were issued by the forwarders to the appellant, which were paid by the appellant; and

(iv) there were series of communications directly between Scania UK and the appellant *vide* emails as shown at pp. 62 to 63 of rekod rayuan jilid 2 part which goes to show and support the proposition that the appellant was an importer.

[15] Learned Senior Federal Counsel, Puan Natrah binti Idris submitted that the second respondent had taken into account the conduct and demeanor of the appellant relying at the above facts and found the appellant to be an importer as envisaged under s. 2 of the Customs Act, and issued the notice of demand to the appellant.

[16] Learned counsel for the appellant, Encik JR Ravendren (Encik Shanker Kaliyana Sundaram with him) submitted before us that the second respondent and eventually the first respondent had failed to give a proper appreciation of some of the facts above and further had failed to take into consideration some other relevant facts in coming to his decision. It was therefore submitted that since the first respondent had relied on the facts presented to him by the second respondent, which were not properly appreciated, the first respondent had fallen into the same error as the second respondent.

[17] Firstly, Encik JR Ravendren highlighted to us that Scania Malaysia was the party, which paid for the price of the said prime movers to Scania UK. The appellant in turn, paid the full purchase price locally based on local market price to Scania Malaysia. According to learned counsel, this is evidenced from the invoices from Scania UK, which was directly made to Scania Malaysia.

[18] Learned counsel contended that the purported email correspondences between the appellant and Scania UK which the respondents had relied *inter alia* to infer that there was a direct dealing between the appellant and Scania UK, were in relation to used prime movers in Complete Knock Down (CKD) and not the prime movers bought by the appellant which was imported in Complete Built-Up (CBU) form (pp. 504 to 506 of the appeal records). In that dealing, the appellant was a commission agent of Scania UK and has nothing to do with these prime movers.

[19] We agreed with learned counsel that the facts laid out above are relevant facts that the respondents ought to have given consideration to in arriving at the decision to demand the short-paid taxes from the appellant. In accepting the email communication, to support a finding that the appellant was an importer, the respondents failed to note and appreciate that the content of the email communications relate to CKD prime movers where the appellant was a commission agent, which have no relevance to the importation of CBU prime movers herein.

[20] In dealing with the judicial review application, the learned High Court Judge had rightly reminded himself of the law and the role of the court, that the court under a judicial review exercise is not entitled to consider whether the decision is fair and reasonable because the court does not concern itself with the decision but the decision making process. Such restriction on the court must be observed to prevent the potential abuse of usurping the power of a tribunal or decision making body (see *T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302). It is trite law that judicial review is not an appeal from a decision but a review on the manner a decision is made (see *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159. The three often quoted areas when a court would interfere as decided in the *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1984] 3 All ER 935 are on the grounds of illegality, irrationality and procedural impropriety.

[21] In *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 (FC) it was held that the principle to which a reviewing court should scrutinise the decision of a tribunal includes amongst others where the findings of a tribunal had been arrived at by taking into consideration irrelevant matters and failing to take into consideration relevant matters.

[22] We agreed with learned counsel for the appellant that there was other relevant facts brought out by the appellant namely, that its dealing with Scania Malaysia was a relevant fact to determine if the appellant was indeed an importer. The second respondent in our view had wrongly appreciated the email communications between the appellant with the Scania UK when the email communications was not related to the prime movers bought by the appellant in this appeal.

[23] Of our particular concern is the fact that the second respondent had sought the short-paid taxes from two respective parties, that is from the appellant as well as Scania Malaysia. The respondent did not deny this particular fact in the affidavit. We were reminded by Encik JR Ravendran that in interpreting taxing statute, there is no room for intendment, equity or presumption as stated by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetables Oils Sdn Bhd* [2004]

A 2 CLJ 265. The Federal Court was referring to the Privy Council decision in *Mangin v. Inland Revenue Commissioner* [1971] AC 739, where Lord Donovan laid out one of the important principles in interpreting tax statute is that there is no room for any intendment, that there is no equity about tax and there is no presumption so as to tax.

B **[24]** We do not find any discussion by learned SFC in response to this issue either. We also do not find any part of the affidavit of the first respondent denying the same. We agree with the appellant's counsel that taxing law must be clear and cannot operate in ambiguity.

C **[25]** The demand made by the second respondent on two persons for the same short-paid taxes had created ambiguity and serious doubt as to who should be the one liable under the law. It cannot be over emphasised that taxing statute must be given strict interpretation as stated by the oft quoted judgment of Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* 12 TC 358. In this regard, the Supreme Court in *National Land*
D *Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339 speaking through Gan Chitt Tuan CJ (as His Lordship then was) had stated that the courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists. It would be absurd and unjust to impose liability on the appellant as well as Scania Malaysia at the
E same time.

[26] As to the discretion of the first respondent, we are in no doubt the first respondent is empowered with the necessary discretion to be exercised upon objective appreciation of the evidence before him. However, a decision premised on wrong appreciation of facts and the failure to consider relevant
F facts must stand quashed.

[27] In para. 7 of his affidavit, the first respondent made it clear that he had considered all evidence brought before him and having considered them, he declined the application of the appellant. Having found that the second respondent had failed to take into account some relevant facts and had taken
G into account some irrelevant facts we agreed with learned counsel that the decision of the respondent is one which is tainted with illegality as stated in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 and *Ranjit Kaur Gopal Singh v. Hotel Excelsior* (*supra*).

H **[28]** In the circumstances, we would allow the appeal of the appellant with costs of RM10,000 to the appellant. The deposit is to be refunded to the appellant.

I